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In the Supreme Court of the United States

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DREW S. DAYS, III
Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD H. SEAMON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

52 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer cannot refuse to bargain with the union and withdraw recognition from it based on a good-faith doubt about the union's majority status at the time of acceptance, when the asserted doubt is premised on events that occurred and were known to the employer before acceptance.

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OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-8a) is reported at 60 F.3d 24. The supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 9a-58a) is reported at 317 N.L.R.B. 364.

The earlier decision of the court of appeals, remanding the case to the Board (Pet. App. 59a-83a), is reported at 980 F.2d 804. The initial decision and order of the Board (Pet. App. 84a-89a) and the decision of the administrative law judge (Pet. App. 90a-120a) are reported at 303 N.L.R.B. 562.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1995. The petition for a writ of certiorari was filed on October 15, 1995, and was granted on January 19, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;

> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT

1. At relevant times, petitioner operated an iron fabrication shop in Hudson, Massachusetts, with approximately 23 production and maintenance employees. In 1977, the National Labor Relations Board (Board), after an election, certified Shopmen's Local No. 501, a/w International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO (the Union), as the collective bargaining representative of a bargaining unit comprising those employees. Thereafter, the parties negotiated and executed successive collective bargaining agreements covering the bargaining unit. Pet. App. 10a-11a, 60a-61a, 95a; J.A. 69a-70a.

On September 21, 1988, petitioner and the Union began negotiations for an agreement to replace the one then in effect, which was to expire on September 25, 1988. Additional bargaining sessions took place on September 30, October 4, and October 13, 1988. On October 14, 1988, after the initial bargaining failed to produce an agreement, the employees in the unit went out on strike. Negotiations continued during the strike at bargaining sessions held on October 18, October 26, and November 17, 1988. Pet. App. 11a, 61a-62a, 97a-98a, 109a.

At the bargaining session on November 17, 1988, petitioner presented a complete contract proposal to the Union. Pet. App. 107a. Petitioner asserts (Pet.

Br. 3) that the proposal was less generous than prior proposals because of petitioner's belief that the Union was losing support among the employees. The Union neither accepted nor rejected the proposal on November 17, and petitioner took no action to withdraw the proposal, either on that date or thereafter. Pet. App. 11a, 61a-62a, 95a-98a, 109a.

On November 18, 1988, the picket line maintained at petitioner's plant by the striking employees was taken down. Pet. App. 11a, 36a n.47. On November 27, 1988, the Union sent petitioner a telegram stating that the Union accepted petitioner's November 17 offer. *Id.* at 63a; J.A. 65a. The telegram also stated that the strike was over and that the employees would return to work immediately. *Ibid.* However, the following day, November 28, 1988, petitioner sent the Union a telegram stating (J.A. 66a): "Employer now has reason to believe that [the Union] no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations."

Petitioner based its alleged belief that the Union had lost majority status on events that occurred, and of which petitioner was aware, prior to the Union's November 27 acceptance of petitioner's contract offer. See Pet. App. 72a; see also *id.* at 11a-12a; Pet. Br. 5-6. Specifically, petitioner asserted that nine of the 23 unit employees had crossed the picket line (Pet. App. 72a); as noted above, the picket line came down on November 18 (*id.* at 11a, 36a n.47). Petitioner also asserted that 13 unit employees had resigned from the Union by signing a form prepared by petitioner (*id.* at 72a; see J.A. 43a-44a); 12 of those forms were dated on or before November 21, 1988, and the remaining form was dated November 23, 1988 (J.A. 76a; see also J.A.

71a-77a). In addition, petitioner claimed that 16 unit employees had expressed dissatisfaction with the Union. Pet. App. 72a. Petitioner's vice-president testified that many of those expressions of dissatisfaction occurred on or before November 18. J.A. 42a; see also J.A. 17a-40a.

2. a. In January 1989, the Board's General Counsel issued an administrative complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158 (a)(1) and (5), by refusing to execute a written contract with the Union and by withdrawing recognition from it on November 28, 1988. Pet. App. 64a-65a, 91a-92a.

After a hearing, the Board, in agreement with the administrative law judge (ALJ), sustained the allegations of the complaint. Pet. App. 84a-120a. The Board (like the ALJ) refused to consider petitioner's contention that it had a good-faith doubt that the Union had majority support when it accepted petitioner's outstanding contract proposal. Relying on *Belcon, Inc.*, 257 N.L.R.B. 1341, 1346 (1981), and *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021, 1022 (1975), the Board explained that, "under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a[n] [employer's] alleged good-faith doubt of the union's majority status." Pet. App. 85a n.85. The Board ordered petitioner, among other things, to enter into a written contract with the Union based on the contract proposal that the Union accepted on November 27, 1988. *Id.* at 86a, 115a, 116a.

b. The Board filed an application for enforcement of its order in the court of appeals. Pet. App. 60a. The

court held that "[t]he Board acted well within its authority in finding that [petitioner's] offer of November 17, 1988, was still on the table when the Union's negotiating committee purported to accept it by telegram on November 27, 1988." *Id.* at 70a. The court also upheld the Board's determination that the Union's negotiating committee was not required to obtain membership ratification in order to enter into a binding collective bargaining agreement. *Id.* at 70a-71a. The court declined to enforce the Board's order "at th[at] time" (*id.* at 60a, 83a), however, because the court believed that the Board had not sufficiently explained its refusal to consider petitioner's assertion of a good-faith doubt about the Union's majority status (see *id.* at 72a-82a).

3. On remand, the Board issued a lengthy supplemental decision and order. Pet. App. 9a-58a. In that decision, the Board adhered to its prior rule that, "where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement." *Id.* at 28a. The Board recognized that, in "extraordinary circumstances," an employer's good-faith doubt about the union's majority status may "develop[] contemporaneously with a union's purported acceptance of its offer." *Id.* at 54a. The Board stated that it would evaluate "such infrequent instances" on a case-by-case basis. *Ibid.*

The Board began its analysis by discussing the presumptions that it had developed regarding a union's majority status. Pet. App. 21a-25a. The Board explained that where, as here, a union has been

certified by the Board as the exclusive bargaining representative for a unit of employees, the union ordinarily enjoys an irrebuttable presumption of majority support for the first year following its certification and during the term (for up to three years) of any collective-bargaining agreement. *Id.* at 22a-23a & n.26. The Board continued: "After the certification year (and in the absence of a collective bargaining agreement), the presumption of majority status remains, but becomes rebuttable"; an employer may rebut the presumption "by establishing either (1) that at the time of the refusal to bargain a majority of employees did not in fact support the union, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union's majority status." *Id.* at 22a-23a. The Board observed that this Court has recognized that these presumptions "promote industrial peace," which the Court has described as the "overriding policy of the Act." *Id.* at 22a, 24a (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987), and *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954)).

The Board next described the circumstances under which an employer may refuse to bargain with a union based on a good faith doubt about its majority status. Pet. App. 25a-28a. The Board observed that an employer may assert such a doubt "[w]ithin a reasonable time before a collective bargaining agreement expires." *Id.* at 25a. The employer may also do so "after the contract has expired * * * at any time prior to a union's acceptance of [the employer's] contract proposals." *Id.* at 25a-26a. The Board reaffirmed its rule that, after such acceptance, the employer may not assert a good-faith doubt "based on events occurring

after acceptance." *Id.* at 27a (citing *North Bros. Ford*). The Board also reaffirmed the rule applicable here: *i.e.*, that an employer may not assert a post-acceptance doubt about a union's majority status when that doubt is based on events occurring and known to the employer prior to acceptance. Pet. App. 28a (citing *Belcon* and *Chicago Tribune Co.*, 303 N.L.R.B. 682 (1991), enforcement denied, 965 F.2d 244 (7th Cir. 1992)).

The Board explained that its rule precluding consideration of post-acceptance employer assertions of doubt based on pre-acceptance events is consistent with Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 28a-31a. That provision, the Board observed, reflects that collective bargaining is "[c]entral" to achievement of the Act's "fundamental aim" of maintaining "industrial peace." *Id.* at 29a & n.35 (quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981)). The Board determined (Pet. App. 29a):

> [I]t is inconsistent with the concept of good-faith bargaining for the Board to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract.

The Board noted that in similar contexts it had refused to allow employers to avoid their bargaining obligations by manipulating the timing of their assertion of doubt about the union's majority status.

Id. at 30a-31a & nn.39-40 (citing cases). The Board reasoned that the present context provided a similar risk of manipulation: An employer that became aware of grounds for doubting the union's majority status while the employer's contract offer was outstanding could "sit" on that doubt and raise it after a contract had been formed if, in hindsight, the contract turned out to be not to the employer's liking. *Id.* at 36a; see also *id.* at 32a-37a.

The Board also explained that its rule is not inconsistent with Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), or with this Court's holding that Section 8(a)(2) prohibits an employer from recognizing a minority union even if the employer believed in good faith that the union represented a majority of the employees at the time of recognition. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). The Board observed (Pet. App. 39a) (emphasis omitted):

> [*Garment Workers*] involved an employer's recognition of a nonincumbent, initially organizing actual-minority [u]nion. This case, on the other hand, involves [petitioner's] withdrawal of recognition of the incumbent, presumptively majority Union. In [*Garment Workers*], the employer's asserted good-faith belief that the union had achieved majority status at the time of recognition was no defense to its unlawful recognition; in this case, the issue is whether [petitioner's] asserted good-faith belief that the Union had lost its presumptive majority status is a validly raised defense to its withdrawal of recognition.

The Board also observed that the issue in *Garment Workers* was whether the employer's conduct violated

Section 8(a)(2) of the Act, whereas the issue in this case is whether the employer's conduct violated Section 8(a)(5). Pet. App. 38a-39a. The Board concluded that these factual and legal differences justified "different accommodations between the dual interests of furthering labor relations stability and ensuring employee freedom of choice." *Id.* at 39a.

The Board emphasized that it was making a "policy choice" in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an alleged good-faith doubt." Pet. App. 53a (emphasis omitted). That policy choice was based on the Board's determination that "the stability resulting from" its rule "outweighs [the rule's] potential adverse impact on employee freedom of choice." *Ibid.*

Finally, the Board determined that its rule applied here. The Board found it "clear" from testimony at the hearing that petitioner "harbored its doubt [about the Union's majority status] while its contract offer was outstanding." Pet. App. 36a. Accordingly, the Board concluded that petitioner "could not raise its alleged good-faith doubt as a defense to its withdrawal of recognition and refusal to execute the contract." *Id.* at 34a. The Board therefore found it "unnecessary to pass on whether [petitioner] presented sufficient objective evidence to support a reasonable, good-faith doubt of the Union's majority status." *Ibid.*

4. After remand, the court of appeals enforced the Board's order. Pet. App. 8a. The court held that "the Board's policy choice is reasonable and, as now articulated, quite persuasive." *Id.* at 6a. The court rejected petitioner's contention that this case comes "within the exception set forth in the Board's opinion

for cases in which a company's good faith doubt arises simultaneously with the union's acceptance of the offer." *Id.* at 6a n.2. The court "agree[d] with the Board's implicit conclusion that this case does not fall within the exception, as [petitioner] had all of the relevant information to support its claim prior to [the Union's] acceptance of the offer." *Ibid.*

SUMMARY OF ARGUMENT

I. In holding that petitioner violated Section 8(a)(1) and (5) of the Act, the Board reaffirmed its rule that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer may not refuse to bargain with the union and withdraw recognition from it based on a good-faith doubt about the union's majority status at the time of acceptance, when the doubt is premised on events that occurred and were known to the employer before acceptance. Under well-established principles, the Board's rule must be upheld if it is rational and consistent with the Act. The Board's rule satisfies that standard, especially when it is viewed in the context of other decisions of the Board and this Court that address the striking of a balance between the Act's dual objectives of promoting stability in bargaining relationships while preserving the freedom of employees to select, or to refrain from selecting, a bargaining representative.

The Board's rule promotes stability in bargaining relationships primarily by preventing an employer from "sitting" on its doubt about a union's majority status during bargaining for an agreement, only to raise it if and when the agreement turns out, in hindsight, to be not to the employer's advantage. The rule thereby discourages conduct that is inconsistent

with good-faith bargaining, encourages the formation of collective bargaining agreements, and helps ensure that, after an agreement has been formed, the union can concentrate on translating that agreement into a written contract and on administering the contract. At the same time, the Board's rule leaves ample opportunity for the employer to raise a good-faith doubt about a union's majority status by other established means. Moreover, the rule leaves undisturbed the existing means by which employees may raise such doubts.

The Board's rule is consistent with the case law that construes Section 8(a)(2) of the Act to prohibit an employer from entering into a bargaining agreement with a union that lacks majority status at the time of the formation of the agreement. That case law involves unions that are shown to have actually lacked majority support when the agreement was formed. It is inapposite here, because petitioner has never alleged, and neither the Board nor the court of appeals ever determined, that the Union actually lacked majority status when it accepted petitioner's contract offer. Rather, petitioner has asserted only a good-faith doubt about the union's majority status. Nothing in the Act or the case law upon which petitioner relies makes an otherwise lawful collective bargaining agreement between an employer and a previously certified union illegal merely because, when the union accepted the agreement, the employer harbored a good-faith, but unarticulated, doubt about the union's continued majority status.

The Board's rule rationally precludes all post-acceptance assertions of good-faith doubt by an employer that are based on pre-acceptance events known to the employer. Contrary to petitioner's

contention, the Board is not required to determine the timeliness of an employer's post-acceptance assertion of doubt by considering in each case whether the employer had a reasonable opportunity to investigate the evidence on which the doubt is premised and to communicate that doubt to the union.

II. In any event, petitioner had a reasonable opportunity both to investigate the evidence on which it premised its asserted good-faith doubt about the Union's majority status and to communicate that doubt to the Union. The record establishes that petitioner had received most or all of that evidence by Monday, November 21, 1988. The Union did not accept petitioner's outstanding contract offer until Sunday, November 27, 1988. Thus, petitioner was afforded more than the "few days" it insists (Pet. Br. 31) was required to evaluate the evidence and convey its doubt.

ARGUMENT

Section 8(a)(5) of the National Labor Relations Act (Act) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representative[] of his employees." 29 U.S.C. 158(a)(5); see also 29 U.S.C. 158(a)(1) (making it an unfair labor practice for an employer to interfere with employees' exercise of rights under 29 U.S.C. 157, which includes right to bargain collectively). It is undisputed that the Union in this case was certified by the Board as the exclusive bargaining representative of a unit comprising petitioner's production and maintenance employees. See 28 U.S.C. 159(a). Petitioner nonetheless refused to bargain with the Union and withdrew recognition from the Union after it had accepted petitioner's outstanding offer for a collective

bargaining agreement, based on petitioner's purported doubt that the Union enjoyed the support of the majority of the unit employees at the time of acceptance.

The Board held that petitioner's refusal to bargain with, and withdrawal of recognition from, the Union violated Section 8(a)(1) and (5). In so holding, the Board reaffirmed its prior rule that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer cannot vitiate the agreement on the basis of a good-faith doubt about the union's majority status premised on events that occurred and were known to the employer prior to acceptance. Pet. App. 53a; see *id.* at 27a (citing *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021 (1975)), 37a (citing *Belcon, Inc.*, 257 N.L.R.B. 1341 (1981)), 85a n.85 (citing *Belcon* and *North Bros. Ford*). We show in Point I below that the Board's rule should be sustained. We show in Point II below that, even if the rule is not sustained, the Board reasonably refused in the circumstances of this case to consider petitioner's asserted doubt about the Union's majority status.

I. THE BOARD ACTED WITHIN ITS DISCRETION IN ADOPTING A RULE PROVIDING THAT, AFTER A PREVIOUSLY CERTIFIED UNION HAS ACCEPTED AN EMPLOYER'S OFFER FOR A COLLECTIVE BARGAINING AGREEMENT, THE EMPLOYER MAY NOT REFUSE TO BARGAIN WITH THE UNION AND WITHDRAW RECOGNITION FROM IT BASED ON A GOOD-FAITH DOUBT ABOUT THE UNION'S MAJORITY STATUS AT THE TIME OF THE ACCEPTANCE, WHEN THE DOUBT IS PREMISED ON EVENTS THAT OCCURRED AND WERE KNOWN TO THE EMPLOYER BEFORE ACCEPTANCE

A. Under Well-Established Principles Of Deference, The Board's Rule Must Be Upheld If It Is Rational and Consistent With The Act

As this Court has repeatedly stated, "[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957); accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (Board has "primary responsibility for developing and applying national labor policy"); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 431 (1978); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Accordingly, the Court gives "considerable deference" to the Board's interpretation of the Act, and

will uphold that interpretation if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 787; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. at 350; see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Deference is particularly appropriate when the Board's interpretation is informed by considerations of labor policy. "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Thus, when a Board rule is the result of the Board's exercising the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," the rule "is 'subject to limited judicial review.'" *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *Truck Drivers*, 353 U.S. at 96. See also *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995); *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994).

These principles of deference apply to the Board rule at issue here. The Board decided "as a policy matter" that "the stability resulting from" that rule "outweighs the potential adverse impact on employee freedom of choice." Pet. App. 53a. That policy judgment, moreover, was based in significant part on the Board's assessment of the realities of labor-management relations. In particular, the Board de-

termined that, in the absence of its rule, an employer who develops doubts about a union's majority status while the employer's contract offer is outstanding could keep those doubts to itself until after its offer is accepted and a contract had been formed, and raise them if and when the employer determines, in hindsight, that the contract was not to its benefit. Because the Board's decision was based on policy considerations and factual assessments that Congress entrusted primarily to the Board, its decision is entitled to considerable deference.

B. The Board's Rule Is Properly Viewed In The Context Of Other Board Rules And Decisions Of This Court That Involve Accommodation of the Act's Policies of Promoting Stability In Bargaining Relationships While Preserving Employee Freedom To Select, Or Refrain From Selecting, Bargaining Representatives

The rule applied by the Board in this case can properly be reviewed only in the context of the legal framework within which it developed. That framework includes the Board's presumptions regarding a union's majority status. It also includes other Board rules, as well as decisions of this Court, that, like the rule applied here, recognize the "dual objectives" of the Act "to further industrial peace and labor relations stability by encouraging the practice and procedure of collective bargaining while preserving for employees the right to choose, or to refrain from choosing, a bargaining representative." Pet. App. 21a & n.20 (citing 29 U.S.C. 151), 22a.

The presumptions regarding majority status have been described in prior decisions of this Court. "First, after a union has been certified by the Board

as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River*, 482 U.S. at 37; see also *Curtin Matheson*, 494 U.S. at 777-778; *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 & n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). A union is entitled to the same conclusive presumption of majority status during the term (for up to three years) of any collective-bargaining agreement. See *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. at 343 n.8 ; *Burns*, 406 U.S. at 290 n.12; see also *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).[1] After the certification year or the collective-bargaining agreement expires, the presumption of majority status continues, but becomes rebuttable. See *Curtin Matheson*, 494 U.S. at 778; *Fall River*, 482 U.S. at 38; *Burns*, 406 U.S. at 279 n.3, 290 n.12 (1972); *Brooks*, 348 U.S. at 99; see also Pet. App. 22a-23a. "Under the Board's longstanding approach, an employer may rebut that presumption," and thereby justify a refusal to bargain with the union, "by showing that, at the time of the refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778; see also *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), enforced, 891

[1] A union's "conclusive" presumption of majority status may be overcome only in "unusual circumstances," such as where the certified union dissolves or becomes defunct, or where substantially all the members and officers of the certified union transfer their affiliation to a new local or international as the result of a schism. See *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). None of those circumstances is present.

F.2d 230 (9th Cir. 1989); *Celanese Corp.*, 95 N.L.R.B. 664, 672 (1951).[2]

As this Court has explained, these presumptions "are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision." *Fall River*, 482 U.S. at 38. Specifically, the presumptions further the Act's "overriding policy" of "industrial peace" by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees." *Ibid.* (internal quotation marks and citations omitted). They promote stability in two ways. First, "they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Ibid.*[3] Second, they "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*[4] "The upshot of the presumptions is to permit

[2] To demonstrate an actual lack of majority support, the employer must make a "numerical showing" that the unit employees do not wish to be represented by the union; by contrast, to demonstrate a good-faith doubt about the union's majority status, the employer may rely on circumstantial evidence. *Curtin Matheson*, 494 U.S. at 788 n.8.

[3] See also *Brooks*, 348 U.S. at 100 (Board's presumptions reflect judgment that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out").

[4] See also *Brooks*, 348 U.S. at 100 ("It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies * * *, union strength may erode and thereby relieve him of his statutory duties at any time, while if he

unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Id.* at 38-39.

This Court has rejected the notion that, by limiting the ability of *employers* to challenge a union's majority status, the presumptions impermissibly limit the right of *employees* to select, or refrain from selecting, a bargaining representative. See *Fall River*, 482 U.S. at 38 (presumptions operate "without impairing the free choice of employees"). For example, in *Brooks* v. *NLRB*, an employer received a petition signed by nine of the 13 employees in the bargaining unit stating that they did not wish to be represented by the union that had been selected by a majority of the employees in that same unit in a Board-supervised election held one week earlier. 348 U.S. at 97. This Court sustained the Board's determination that the employer had violated Section 8(a)(5) by subsequently refusing to bargain with the union. 348 U.S. at 103-104. The Court rejected the employer's contention that, "whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain." *Id.* at 103. The Court concluded that "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Ibid.*[5]

works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.").

[5] Decisions of this Court after *Brooks* also recognize the validity of the Board's presumptions regarding a union's majority status. In *Burns*, the Court held that a successor employer had to bargain with the union certified to represent the employees of its predecessor. 406 U.S. at 277-281. In so holding, the Court determined that the successorship was "not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period." *Id.* at 279; see also *id.* at 279 n.3, 290 & n.12. Similarly, the Court in *Fall River* "comment[ed] approvingly" on the presumptions, as the Board observed in the present case (Pet. App. 24a), in upholding a decision by the Board concerning the bargaining obligations of a successor employer. In *Curtin Matheson*, the Court held that, in determining whether an employer had demonstrated a good-faith doubt about a union's majority status, the Board reasonably refused to presume that striker replacements opposed the union. 494 U.S. at 786-796. See also *Iron Workers*, 434 U.S. at 343 n.8 (citing with apparent approval conclusive presumption of majority status that obtains during term of collective bargaining agreement).

In other contexts, the Court has similarly recognized that the Act's policy of promoting stability in bargaining relationships may justify limits on challenges to a union's majority status. In *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960), the Court held that the Act's six-month statute of limitations barred an unfair labor practice charge based on an employer's execution of a collective bargaining agreement with a union that actually lacked majority support at the time of execution. *Id.* at 412, 416-429. The Court rejected the continuing-violation theory on which the Board rested its claim of timeliness. The lower court had accepted that theory on the ground that the Board reasonably could have concluded that "the interests of [employee] self determination outweighed otherwise important competing considerations of burying stale disputes." *Id.* at 428. In reversing the lower court, this Court determined that "the accommodation between these

competing factors has already been made by Congress." *Ibid.* (brackets supplied by Court). The Court explained (*ibid.* (internal quotation marks omitted)):

> It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in industrial peace which it is the overall purpose of the Act to secure.

The Court has also recognized that, when Congress has not specifically struck the balance between promoting stability in bargaining relationships and employee self-determination, the Board has broad discretion to do so. Cf. *Beth Israel*, 437 U.S. at 504 ("it is the Board upon whom the duty falls in the first instance to determine the relative weight of the conflicting interests and to balance their weight"). In *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), the Court held that the Board may order an employer that has committed an unfair labor practice to bargain with a union that had lost its majority status as a result of the unfair labor practice. The Court rejected the employer's contention that the order produced "injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement." *Id.* at 705. The Court pointed out that the order was "not intended to fix a permanent bargaining relationship"; rather, it was intended to reflect that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Ibid.*

The Board carefully examined the foregoing precedent in the present case. See Pet. App. 21a-25a, 30a-31a, 46a-53a. As the Board recognized (see *id.* at 20a-21a), this case involves the operation of the Board's presumptions in a particular setting: The question is whether, at a time when a previously certified union ordinarily would enjoy a conclusive presumption of majority status because of its prior acceptance of the employer's contract offer, an employer may assert a good-faith doubt about the union's majority status, when that doubt is based on events that occurred, and were known to the employer, at a time when the union enjoyed only a rebuttable presumption of majority status (*i.e.*, prior to acceptance). To resolve the applicability of the presumptions in that setting, the Board properly considered the manner in which the presumptions "promot[e] stability in collective-bargaining relationships without impairing the free choice of employees." *Id.* at 22a. The Board also properly took into account precedent that, though not directly involving the presumptions, did involve "accommodations of the dual interests in employee free choice and stable bargaining relations." *Id.* at 46a.[6]

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[6] Contrary to petitioner's assertion (Pet. Br. 15-17, 19-21), neither this Court's decision in *Curtin Matheson*, nor that of the Eleventh Circuit in *NLRB* v. *Bickerstaff Clay Products Co.*, 871 F.2d 980 (1989), foreclosed the rule adopted by the Board in this case. Although the employer in each of those cases raised its assertion of a good-faith doubt after the union's acceptance of the employer's contract offer, in neither case did the parties litigate the timeliness of the employer's assertion of a good-faith doubt. Instead, the parties framed the issue as whether the employer had demonstrated a good-faith doubt, and, in particular, whether the employer could rely on a

C. The Board's Rule Is Rational And Consistent With The Act

1. *The Board's rule discourages employer conduct that is inconsistent with good-faith bargaining, and it effectuates the Act's policies of encouraging the formation of collective bargaining agreements and providing stability in established bargaining relationships.*

a. The Board's rule reasonably requires an employer who develops a good-faith doubt about the union's majority status in the course of negotiations to voice his doubt at that point, while the union's presumption of majority support is rebuttable. When the employer does so, the employer may continue to bargain and file a representation petition with the board to determine the union's majority status. Alternatively, the employer may break off negotiations; if it does so, the employer's demonstration of a good-faith doubt about the union's majority status provides a defense to the charge that the employer's refusal to bargain with the union constituted an unfair labor practice.

The conclusion of an agreement between the union and the employer is properly regarded as an event that significantly alters the relationship between the parties. It is reasonable to require the employer, after that point, to hold its peace with regard to doubts it may have entertained prior to the agreement's formation. Once an agreement is concluded, the time for bargaining and for the often disruptive tactics that attend it is over. Each side must accept the result of the bargaining process and get on with

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presumption that striker replacements did not support the union. See Pet. App. 55a-56a.

the business of reducing the agreement to writing and administering the resulting written agreement.

The significance properly accorded to the point at which an agreement is formed between an employer and a union would be drastically diminished if the employer could, during the term of the agreement, attempt to prove that it harbored doubts about the union's majority status at the time the agreement was formed. As long as the employer has that opportunity, the agreement remains conditional in a sense. Both parties know that everything done under the agreement could be undone. That awareness can only undermine the stability of the bargaining relationship.

The extent to which the Board's rule fosters stability in bargaining relationships is especially clear when it is recognized that proof of a good-faith doubt about a union's majority status differs significantly from proof of an actual loss of majority status. Here, for example, petitioner sought to rely on evidence that a number of employees crossed the picket line. Pet. App. 72a. Even if we assume that such evidence is relevant to the existence of a good-faith doubt, it has little if any probative value in establishing an actual loss of majority status. An employee's decision to cross the picket line is ambiguous, standing alone. It may indicate the employee's financial situation rather than a desire not to be represented by the union. Moreover, the significance of the employee's decision can become more difficult to assess with the passage of time. For example, when a company relies on an employee's decision to cross the picket line months after that conduct occurred, the employee may have left the company's employment or may view differently in retrospect the

motive for that decision. The Board's rule properly prevents an employer from relying on such conduct to vitiate an agreement that is already in place.[7]

b. Thus, the Board's rule promotes stability in bargaining relationships in several ways.

1. The Board's rule, like the presumptions underlying it, discourages employer conduct that is inconsistent with good-faith bargaining. See *Fall River*, 482 U.S. at 38; *Brooks*, 348 U.S. at 100. As the Board explained, if an employer were permitted to "sit" on its doubt about the union's majority status until after the union had accepted the employer's contract offer, it could "unilaterally" vitiate, at any time during its term (within the statutory limitation period), an agreement that in hindsight proved to be not to the employer's liking. Pet. App. 36a. Such conduct is at odds with the statutory obligation to bargain in good faith. See *id.* at 29a. It is rational for the Board to adopt a rule that removes any incentive the employer may otherwise have to engage in such improper bargaining tactics. That rule, moreover, is firmly grounded on the Board's experience that some employers actually do engage in such tactics.[8]

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[7] The Board has not taken and does not take a position on whether it would entertain an employer's claim, after a union's acceptance of a bargaining agreement, that the union actually lacked majority support when the agreement was formed, where the employer based that claim on events that occurred and were known to the employer prior to the formation of the agreement. As explained in the text, the substantiation required to support such a claim would ordinarily differ from that required to support a claim of good-faith doubt by the employer.

[8] See Pet. App. 31a nn.39-40 (citing *Bennett Packaging Co.*, 285 N.L.R.B. 602, 608 (1987) (employer's alleged doubt about union's majority status was not held in "good faith" when it "was not raised until * * * full agreement on the collective-bargaining agreement had been reached, though the claim was based on information known to [the employer] all through the bargaining process"); *King Radio Corp.*, 208 N.L.R.B. 578, 584 (1974) (employer's assertion of good-faith doubt about union's majority status was "obvious[ly]" made merely as "an afterthought" in response to union's filing of unfair labor practice charges, in light of, *inter alia*, the fact that during extended period of close negotiations, employer "had never made a claim to the Union that it doubted its majority status even though the factors upon which it relied to establish the alleged doubt * * * were well known to the [employer] during all critical times"), enforced, 510 F.2d 1154 (10th Cir.), cert. denied, 423 U.S. 839 (1975); *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124, 1129 (1989) (finding unlawful the "bargaining ploy" of "[n]egotiating only so long as negotiations appear to produce desired results and then breaking them off when they fail to do so" on the basis of an alleged good-faith doubt harbored by employer during the negotiations), enforced, 899 F.2d 104 (1st Cir. 1990)).

The Board's rule also effectuates the Act's policy of encouraging the formation of collective bargaining agreements. See 29 U.S.C. 151. Under the Act, "an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn." *Pepsi-Cola Bottling Co.* v. *NLRB*, 659 F.2d 87, 90 (8th Cir. 1981); accord *NLRB* v. *Burkart Foam, Inc.*, 848 F.2d 825, 830 (7th Cir. 1988). Thus, a strike, a counter-proposal, or a rejection of the employer's outstanding offer does not terminate the offer, for such limitations would "run[] counter to federal labor policy which encourages the formation of collective bargaining agreements." *Pepsi-Cola Bottling*, 659 F.2d at 89. The Board's rule prevents nullification of

that policy by insuring that, when a contract offer has been accepted, the resulting contract cannot be abrogated in the absence of a showing of a true change in circumstances, and not merely on the basis of a good-faith doubt about the union's majority status that antedated acceptance of the contract offer. See Pet. App. 33a ("if an employer fails to raise a doubt based on known preacceptance factors until after acceptance, the Board will not view those factors as 'changed circumstances' vitiating the employer's offer or the contract's validity"); see also note 1, *supra* (describing changes in circumstances sufficient to overcome otherwise conclusive presumption of majority status).

ii. Also like the presumptions underlying it, the Board's rule promotes stability in established bargaining relationships. By precluding an employer's post-acceptance assertion of a good-faith doubt about the union's majority status at the time of acceptance, the rule allows the union during the post-acceptance period to focus on obtaining and administering a collective bargaining agreement and on developing a bargaining relationship with the employer. See *Fall River*, 482 U.S. at 38.

The Court in *Fall River* recognized that the union in that case needed the period of repose afforded by the presumption during the "unsettling transition period" between a predecessor employer and its successor "to safeguard its members' rights and to develop a relationship with the successor." 482 U.S. at 39. Similar policy considerations apply where, as here, the union may have abandoned an unsuccessful strike in the belief that it could still obtain a contract, albeit on the employer's terms. See Pet. App. 62a-63a; cf. *Belcon, Inc.*, 257 N.L.R.B. 1341, 1344 & n.8 (1981).

No less than in a successorship situation, the union in the aftermath of an unsuccessful strike faces an "unsettling transition period," since its capitulation to the employer's superior economic strength may have weakened its relationship with the employees. In that situation, it is reasonable to afford the union a period of repose, during which it may demonstrate to the employees that, while the contract may not be as favorable as they might have wished, the union will diligently administer its terms on behalf of the employees, starting with issues that are likely to arise respecting the reinstatement of striking employees. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967) (economic strikers who unconditionally offer to return to work must be reinstated "[i]f and when a job for which the striker is qualified becomes available").[9]

iii. Finally, the Board's rule is informed by its experience that, as a practical matter, the employer's objective actions during negotiations are a more reliable indicator of whether reasons existed for doubting the union's majority status at the time of contract acceptance than are the employer's post-acceptance assertions of such doubt. As the Board

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[9] Petitioner contends that the Board's rule is inconsistent with the presumptions because the presumptions are designed to promote only "lawfully established" bargaining relationships. Pet. Br. 21. Petitioner then argues that a bargaining relationship is not "lawfully established" if it is based on an agreement between an employer and a union that actually lacked majority status at the time the agreement was formed. *Id.* at 24-26. Whatever the merits of that argument, it is inapplicable here. As discussed *infra* (pp. 34-36), petitioner has never asserted that the Union actually lacked majority support at the time of its acceptance of petitioner's contract offer, but has instead asserted only a good-faith doubt about its majority status.

observed, an employer that "continue[s] to bargain * * * by leaving its contract offer on the table" has, by its own conduct, signalled a determination "to treat the union as the representative of a majority of its employees." Pet. App. 29a. Moreover, the Board reasonably determined that the demonstration of a good-faith doubt after acceptance "becomes amenable to post-hoc reasoning and self-serving interpretations." *Id.* at 36a-37a. The Board's rule obviates such problems of proof and the disruptive post-acceptance litigation in which they arise.

2. *The Board's rule reasonably accommodates the legitimate interests of employers and employees.*

a. The Board's rule preserves the employer's prerogative under the Act to withdraw recognition from a union based on a good-faith doubt about its majority status. As the Board explained, an employer has control over "whether or when its doubt will be asserted." Pet. App. 32a. The Board's rule merely requires that, as was true of petitioner, "if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer." *Id.* at 33a. When the employer does so, its assertion of a good-faith doubt is a "changed circumstance" that vitiates the outstanding offer. *Ibid.* Given the employer's ability to void an outstanding contract offer in this fashion, there is no justification for permitting it to wait until acceptance of its offer before raising a pre-existing doubt as to the union's majority status.

Moreover, the Board's rule does not curtail other rights possessed by the employer under the Act. For

example, an employer that develops a good-faith doubt about the incumbent union's majority status after the expiration of an existing agreement may petition the Board for an election. See *Fall River*, 482 U.S. at 41 n.8; *NLRB* v. *Financial Institution Employees of America*, 475 U.S. 192, 198 (1986); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950); 29 U.S.C. 9(c)(1)(B); 29 C.F.R. 102.60(a); see also *Brooks*, 348 U.S. at 104 n.18. Upon the filing of such a petition, the Board will hold an election, if the employer "demonstrate[s] by objective considerations that it has some reasonable ground for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966); *United States Gypsum Co.*, 161 N.L.R.B. 601 (1966).[10]

The employer may protect its legitimate interests even if it is uncertain whether it has enough objective evidence to support a good-faith doubt about the union's majority status during negotiations. In lieu of petitioning for an election, the employer may withdraw an outstanding offer at any time before the union's acceptance for any lawful reason. *Burkart Foam*, *supra*; *Pepsi-Cola Bottling*, *supra*; see, *e.g.*, *J.*

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[10] Under the Board's "blocking charge" rule, the filing of an unfair labor practice charge alleging an unlawful withdrawal of recognition will ordinarily halt the processing of an election petition. NLRB Casehandling Manual (Part Two) § 11730.3 (Sept. 1989); *NLRB* v. *Big Three Industries, Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). As a general matter, however, the employer may avoid the operation of the blocking charge rule by not withdrawing recognition from the union (or committing other unfair labor practices that would preclude a fair election, were one held). In this case, the Board's blocking charge rule would not have applied, because no unfair labor practice charge was filed before the Union accepted petitioner's contract offer and petitioner withdrew recognition from the Union.

Hofert Co., 269 N.L.R.B. 520, 520-521 (1984) (Board found offer withdrawn when not accepted by date specified in offer). Indeed, where, as here, the employer has gained the upper hand in an economic strike, it may, consistent with its bargaining obligations under Section 8(a)(5), withdraw its outstanding contract proposal and make a less generous offer, for "[i]t is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires." *Hickinbotham Bros. Ltd.*, 254 N.L.R.B. 96, 102 (1981); see also, *e.g.*, *Plymouth Stamping Div., Eltec Corp.*, 286 N.L.R.B. 890, 896 (1987), enforced, 870 F.2d 1112 (6th Cir.), cert. denied, 493 U.S. 891 (1989). Petitioner apparently (see Pet. Br. 3) availed itself of that opportunity by making a less generous contract offer on November 17, 1988, but then, notwithstanding an alleged further erosion in the Union's employee support, it elected to leave that offer on the bargaining table so that it could be accepted by the Union on November 27.

b. The Board's rule respects the right of employees "to bargain collectively through representatives of their own choosing" and to refrain from doing so. 29 U.S.C. 157. It gives employees a period of stability during which a union presumptively supported by the majority of the employees has an opportunity to obtain and administer a collective bargaining agreement on their behalf.

Moreover, as the Board emphasized, its rule limits the ability only of *employers* to assert a doubt about the union's majority status. Pet. App. 53a. The Board's rule leaves employees entirely free to pursue their right under the Act to remove or replace their bargaining representative. Under the Act, employees "are not powerless to reject a union that they believe

no longer commands their support." *Fall River*, 482 U.S. at 50 n.16. They may file a decertification petition with the Board during the "window period" 60 to 90 days prior to the expiration of an existing agreement of three years' duration or less. Pet. App. 23a n.26; *Crompton Co.*, 260 N.L.R.B. 417, 418 (1982). In addition, they may file a decertification petition at any time after the existing contract has expired and before the union accepts an outstanding offer by the employer for a new contract. If the decertification petition is supported by a 30% showing of interest among the unit employees, it will ordinarily trigger a Board election. See 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a); *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958).

In this case, the then-current labor agreement between petitioner and the Union expired on September 25, 1988 (Pet. App. 95a); thus, the employees were free to file a decertification petition, pre-expiration, during the period 60 to 90 days prior to September 25, 1988, and, again, during the roughly two-month period from the expiration of the contract (September 25, 1988) until the Union accepted petitioner's contract offer (November 27, 1988). The employees did not do so, however, even though they were aware of their decertification rights.[11] Particularly in those cir-

[11] The record indicates that, in late August or early September 1988, employees Dick Boudreau and John Duckworth asked Gerald Sauer, petitioner's controller, "what they needed to do to get rid of the union." J.A. 60a. Sauer referred the employees to the Board. *Ibid.* Boudreau later told Sauer that he had "called up the NLRB and got the paperwork on it." J.A. 61a. However, no decertification petition was filed; and Boudreau himself joined the strike and the picketing. J.A. 51a-53a. Had the employees filed a decertification petition, the

cumstances, "[t]o allow [petitioner] to rely on [its] employees' rights in refusing to bargain with the [Union] is not conducive to [industrial peace], it is inimical to it." *Brooks*, 348 U.S. at 103.

D. The Board's Rule Is Not Inconsistent With Section 8(a)(2) of the Act Or Case Law Construing That Provision

Petitioner's principal contention is that the Board's rule violates Section 8(a)(2) of the Act, as construed in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), and in certain lower-court decisions. See Pet. Br. 21-26, 28-29, 35-36. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." In *Garment Workers*, this Court held that an employer had violated Section 8(a)(2) by entering into a recognition agreement with an initially-organizing union that actually lacked majority support at the time of the agreement. 366 U.S. at 733-734, 737-738. Petitioner's reliance on Section 8(a)(2) and case law construing it is unpersuasive.

1. Unlike *Garment Workers*, this case involves a claim of a good-faith doubt about a union's majority status, rather than a claim that the union actually lost majority status. The Board repeatedly "emphasized that the case before us does not involve allegations of an actual loss of majority status." Pet. App. 54a n.76; see *id.* at 17a n.16, 20a n.19; see also *id.*

Board's "blocking charge" rule would not have barred Board consideration of that petition, just as the rule would not have barred Board consideration of any petition for an election filed by petitioner. See note 10, *supra*.

at 39a. The Board also emphasized that its decision "does not affect the principle that a union and an employer are not permitted to continue bargaining if the union has actually lost its majority s[t]atus and the employer and the union are aware of this actual loss." *Id.* at 54a; see also *id.* at 38a-39a.[12]

The Board and the courts have recognized the distinction between claims of good-faith doubt and claims of actual loss of majority support.[13] The question presented here is limited to whether the former claim may be asserted by an employer, after the union's acceptance of the employer's contract offer, based on events occurring and known to the employer prior to acceptance.

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[12] Although petitioner repeatedly asserts or implies in this Court that the Union had actually lost majority support at the time that it accepted petitioner's contract offer (see Pet. Br. 13, 18, 21, 23-24, 26-27, 35, 36), it never advanced that claim before the Board. Its failure to do so precludes consideration of that claim by this Court. Section 10(e) of the Act, 29 U.S.C. 160(e), provides in pertinent part that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (holding that under 29 U.S.C. 160(e) the court of appeals "was without jurisdiction to consider" an issue "not raised during the proceedings before the Board"). Petitioner does not contend that such circumstances exist here.

[13] See, *e.g.*, *Curtin Matheson*, 494 U.S. at 778, 788 n.8; *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Comm. Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975); *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), enforced, 891 F.2d 230 (9th Cir. 1989); *Celanese Corp.* 95 N.L.R.B. at 672.

In any event, there is no inconsistency between the Board's rule in this case and the Court's decision in *Garment Workers*. As the Board explained, "the violation found [in *Garment Workers*] was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees." Pet. App. 40a. Here, by contrast, the Union "was the certified representative of [petitioner's] unit employees"; it "was operating under a rebuttable presumption of continued majority support" that "was unchallenged at the time of acceptance" of petitioner's contract offer; and, at that time, "there was no legally cognizable evidence that continued bargaining would involve dealing with a minority union." *Id.* at 40a-41a. Nothing in the Act makes an otherwise lawful labor contract illegal simply because the employer may have harbored a good-faith doubt (that remained unarticulated during the negotiations) about the majority status of the union with which it negotiated that agreement.

2. Similarly misplaced is petitioner's reliance on the Seventh Circuit's decision in *Chicago Tribune Co.* v. *NLRB*, 965 F.2d 244 (1992). Pet. Br. 17-19, 37. There, the court held that, after a union had accepted the employer's contract offer, the employer could assert that the union lacked majority support at the time of acceptance. 965 F.2d at 250. In so holding, the court relied on *Garment Workers* and *Fall River*, 482 U.S. at 51 n.18, for the proposition that "the law forbids a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit." *Chicago Tribune*, 965 F.2d at 249-250 (citation omitted).

Neither that proposition nor the holding in *Chicago Tribune* is applicable here: Petitioner did not know that the Union had lost majority support when it refused to acknowledge the Union's acceptance of its offer; rather, petitioner had, at most, a good-faith doubt about the Union's majority status. Indeed, before the Board and the court of appeals, petitioner never asserted—and neither the Board nor the court found—that the Union in fact lacked majority support at the time of acceptance. See note 12, *supra*. In contrast, the Seventh Circuit in *Chicago Tribune* understood the employer to have based its refusal to sign an agreement with the union on its knowledge that the union had in fact lost majority support at the time of acceptance (965 F.2d at 248); moreover, the court determined that such a loss of majority support had in fact occurred (*id.* at 250). Thus, the Seventh Circuit held that the Board's rule—"that a union's unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed"—does not "apply to a case such as this where between the original offer and its renewal the union lost the support of the workers." *Ibid.* That holding does not govern the resolution of the present case, in which there was neither an assertion by the employer nor a finding by the Board or the court of appeals that the union had actually lost the support of a majority of the workers at the time it accepted the employer's contract offer.

For precisely the same reason, *Garment Workers*, one of the decisions on which *Chicago Tribune* relied, is inapposite here—since *Garment Workers* also involved a union that actually lacked majority support

at the time the contract was formed. In *Fall River* (on which *Chicago Tribune* also relied), the Court suggested that a successor employer might violate Section 8(a)(2) if it recognized the incumbent union before a "substantial and representative complement" of employees had been hired. 482 U.S. at 51 n.18. The basic teaching of *Fall River*, however, is that, once the successor has hired a representative complement of employees, and a majority of that complement consists of employees who worked for the predecessor, the union's rebuttable presumption of majority status continues into the new relationship. *Id.* at 46-52. *A fortiori*, where no successorship was involved, the Union enjoyed a rebuttable presumption of majority support at the time the Union accepted petitioner's contract offer.

3. Petitioner's reliance (Pet. Br. 24-26) on *Royal Coach Lines, Inc.* v. *NLRB*, 838 F.2d 47 (2d Cir. 1988), and *Moisi & Sons Trucking, Inc.*, 197 N.L.R.B. 198 (1972), is also unavailing. Those cases hold that an employer that has voluntarily extended initial recognition to the union may subsequently withdraw recognition from the union if the employer "introduces affirmative evidence *proving a lack of majority status* at the time of the recognition agreement." *Moisi & Sons Trucking*, 197 N.L.R.B. at 198 n.2 (rejecting the defense; emphasis added); *Royal Coach Lines*, 838 F.2d at 55 (finding that union did not in fact have majority status when it obtained voluntary recognition). Neither decision addresses the very different situation presented here, where, after acceptance of a contract by a previously certified, incumbent union which enjoyed a rebuttable presumption of majority status at the time of acceptance, the employer withdraws recognition from the union, based

only upon a pre-existing good-faith doubt as to the union's majority status at the time of acceptance.[14]

E. The Board Rationally Adopted a Bright-Line Rule That Precludes All Post-Acceptance Employer Assertions of Good-Faith Doubt About a Union's Majority Status

The Board acted reasonably in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an al[l]eged good-faith doubt." Pet. App. 53a (emphasis omitted). Petitioner contends, however, that an employer should have a "reasonable opportunity * * * to investigate and verify the information, which, if confirmed, would serve as the basis for the Employer's good faith doubt," as well as "a reasonable period of time to communicate its good faith doubt to the Union." Pet. Br. 27. Contrary to petitioner's contention, the Board was not obligated to adopt a rule requiring a case-by-case determination of whether an employer had such opportunities.

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[14] Petitioner incorrectly suggests (Br. 14 n.4) that the Board's rule is inconsistent with its decision in *Viking Lithographers, Inc.*, 184 N.L.R.B. 139 (1970). There, the Board found that the employer acted lawfully in withdrawing recognition from the union based on a good-faith doubt about the union's majority status. *Id.* at 140. As the Board noted (Pet. App. 26a n.31), however, the parties in *Viking Lithographers*, unlike those here, had not reached a binding agreement when the employer withdrew recognition. See 184 N.L.R.B. at 139-140. Because the claim of a good-faith doubt in *Viking Lithographers* was not made after the formation of an agreement, it was not made at a time when the presumption of majority status was conclusive.

The Board's bright-line rule, based on the date of acceptance, exemplifies the way in which previously recognized presumptions regarding a union's majority status operate. They attach upon the occurrence of objective, readily ascertainable events. Thus, in *Brooks*, the presumption barred an employer from relying on clear-cut proof of a union's actual loss of majority status that arose only one week after an election. See 348 U.S. at 97. In this case, the applicable presumption arose upon the Union's acceptance of petitioner's contract offer. At that point, an agreement was formed that the Union had a right to have embodied in a written collective bargaining agreement. See *H.J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-526 (1941). It is entirely logical that the Board's rule applies at the same point.

More fundamentally, the Board's selection of the acceptance date accords with the purposes of the presumptions. Immediately after acceptance, the union needs the benefit of the presumption in order to focus upon obtaining a written contract incorporating the terms of the agreement. At the same time, the risk arises that the employer may assert a good-faith doubt in order to avoid having to sign such a contract. Of course, the contract proposal that the union has accepted must have been sufficiently complete so that its acceptance creates an enforceable contract. See Pet. App. 107a ("There is no dispute that [petitioner's] extensive oral and written proposals of November 17 effectively comprised a complete contract."). But even a proposal that sets forth all of the essential elements of an agreement usually leaves many details to be worked out. In the process of resolving those details, an employer may well develop misgivings about the agreement. Thus, the Board's rule is

rationally triggered as soon as the need for the presumption of majority status arises.

The Board "recognize[d] that extraordinary circumstances may arise in which a union's acceptance of an employer's final contract offer and the employer's assertion of a good-faith doubt are simultaneous." Pet. App. 54a. The Board indicated that it would address any cases presenting such circumstances on a case-by-case basis. *Ibid.* As the court of appeals observed, however, the Board implicitly determined that this is not such a case. *Id.* at 6a n.2. The court of appeals specifically (*ibid.*) sustained that determination, as well as the Board's related (explicit) finding that the evidence in support of petitioner's alleged good-faith doubt "[was] in existence and known to the employer before acceptance" (*id.* at 20a). Petitioner does not, and cannot, challenge that finding here, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In those circumstances, petitioner provides no basis for setting aside the Board's rule when it suggests (Pet. Br. 27; see also *id.* at 28) that the Board's rule could preclude an employer from asserting a good-faith doubt about a union's majority status if the Union accepts the employer's contract offer "within minutes or hours" of the employer's receipt of the information that gives rise to the doubt.

II. IN ANY EVENT, IN THE CIRCUMSTANCES OF THIS CASE THE BOARD REASONABLY REFUSED TO CONSIDER PETITIONER'S ASSERTION OF A GOOD-FAITH DOUBT ABOUT THE UNION'S MAJORITY STATUS

If petitioner's primary challenge to the Board's rule were sustained, an employer presumably could vitiate a collective-bargaining agreement at any time during the term of the agreement (within the statutory limitation period) on the basis of a good-faith doubt about the majority status of a union at the time that the agreement was formed. Petitioner's fallback position is that, even if the Board may impose some limit on the time when a good-faith doubt may be raised, the limit should be flexible enough to afford an employer a "reasonable period of time" in which to both assess the evidence of a union's loss of support and communicate its doubt to the Union. Pet. Br. 27. As explained above, in the absence of extraordinary circumstances, the Board's rule rationally bars all post-acceptance assertions of good-faith doubt by an employer based on pre-acceptance evidence known to the employer. See pp. 39-41, *supra*. We now show that, in any event, petitioner had a reasonable period of time within which to assess the evidence and communicate its asserted doubt to the Union.[15]

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[15] Neither the Board nor the court of appeals determined whether the evidence was sufficient to support a good-faith doubt about the Union's majority status at the time that it accepted petitioner's outstanding contract offer. Pet. App. 34a, 72a-73a, 80a n.81, 85a n.85. We do not concede its sufficiency here. Rather, our point is that petitioner became aware of that evidence, such as it was, enough in advance of the Union's acceptance to have a reasonable opportunity to assess its significance and to communicate its asserted doubt.

The record demonstrates that petitioner had received most, if not all, of the evidence upon which it based its asserted doubt by Monday, November 21, 1988, six days before the Union telegraphed its acceptance on Sunday, November 27, 1988. As the court of appeals observed, petitioner based its asserted doubt primarily on evidence that, of the 23 unit employees, (1) nine employees crossed the picket line; (2) 13 employees submitted written forms purporting to resign from the Union; and (3) 16 employees expressed dissatisfaction with the Union. Pet. App. 72a; accord Pet. Br. 5-6.[16] The first category of evidence relates to events on or before Friday, November 18, 1988, because that is the date on which the picket line was taken down. Pet. App. 11a, 36a n.47; see also Pet. Br. 30. As to the second category of evidence, 12 of the 13 written resignation forms were dated on or before Monday, November 21. J.A. 71a-77a. Finally, Ralph Auciello, petitioner's vice-president, testified that many of the employees who expressed dissatisfaction with the Union did so on or before Friday, November 18, the day on which the picket line came down and many employees came back to work. See J.A. 42a; see also J.A. 17a-40a, 57a, 60a.[17]

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[16] See also Respondent's [*i.e.*, petitioner's] C.A. Memorandum [regarding Board's supplemental decision and order] 3.

[17] Petitioner also relies (Pet. Br. 6) on evidence that, prior to the Union's acceptance of petitioner's contract offer, an unspecified number of employees who supported the Union told petitioner that they intended to accept permanent jobs elsewhere. Petitioner's witnesses testified that four employees had conveyed that information to petitioner by Friday, November 18, 1988. J.A. 25a-28a, 30a, 47a, 57a.

Petitioner does not dispute that it had received most or all of the evidence supporting its asserted doubt by Monday, November 21, 1988. Although petitioner protests that an employer cannot evaluate such information and communicate its doubt "within minutes or hours," it does not assert that it was required to act that quickly. Pet. Br. 27. Petitioner merely asserts that it had "far less than an adequate basis" for a good-faith doubt "as of [Thursday,] November 17, 1988, when it made its last offer to the Union." Pet. Br. 29. Petitioner elsewhere acknowledges, however, that even as of that date it believed that support for the Union "was on the downslide." *Id.* at 5. Otherwise, petitioner asserts only that it received much of the information regarding the Union's purported loss of support beginning on Friday, November 18, 1988, and over the ensuing three- or four-day period. *Id.* at 30.

The period between Monday, November 21, and Sunday, November 27, 1988, gave petitioner a reasonable opportunity to both evaluate the evidence and communicate its doubt concerning the Union's majority status before the Union accepted petitioner's contract offer on November 27. Indeed, petitioner accomplished both of those activities, by its account, within 24 hours after the Union's acceptance. See Pet. Br. 7; Pet. App. 11a, 35a; J.A. 42a, 66a.[18] Thus, even if, contrary to our submission in Point I, this

[18] Moreover, petitioner's vice-president, Ralph Auciello, testified that, toward the end of the strike (which the Union called off on November 27, 1988), and before the Union had accepted the contract offer, petitioner convened a meeting in order to prepare a list of employees who, petitioner believed, did not wish to be represented by the Union. Pet. App. 36a; see J.A. 48a-49a, 53a-54a, 55a-56a, 68a.

Court were to accept petitioner's contention (Pet. Br. 31) that an employer should have "a few days" to evaluate the evidence of a loss of majority support for the Union and to communicate its doubt about the Union's majority status, the Board's decision should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD H. SEAMON
Assistant to the Solicitor General
FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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